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IN THE

Supreme Court of the United States

October Term, 1975

CHARLES COLES DIGGS, *et al.*,
Petitioners,

v.

CIVIL AERONAUTICS BOARD
and
SOUTH AFRICAN AIRWAYS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Charles Coles Diggs, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in this case on August 4, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 516 F.2d 1248. The Court's opinion is reproduced in the Appendix hereto at 1a, 3a. The Civil Aeronautics Board decided the case on September 5, 1973. The Board's decision, Order 73-10-2, is reproduced in the Appendix at 4a, 31a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 4, 1975. The jurisdiction of the Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

Whether the United States Court of Appeals for the District of Columbia Circuit has jurisdiction under Sec. 1006 (a) of the Federal Aviation Act of 1958, 49 U.S.C. Sec. 1486(a), to review allegations that actions of the Civil Aeronautics Board in respect to a foreign air carrier permit application approved by the President exceeded the Board's statutory authority and violated petitioners' constitutional rights?

STATUTE INVOLVED

The statutory provisions involved are Secs. 402(a) and (b), 404(b), 801 and 1006(a) of the Federal Aviation Act, 49 U.S.C. Secs. 1372(a) and (b), 1374(b), 1461 and 1486 (a), which provide as follows:

Section 402(a) and (b), 49 U.S.C. Sec. 1372(a) and (b) (1970):

"(a) No foreign air carrier shall engage in foreign air transportation unless there is in force a permit issued by the Board authorizing such carrier so to engage.

"(b) The Board is empowered to issue such a permit if it finds that such carrier is fit, willing, and able properly to perform such air transportation and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder, and that such transportation will be in the public interest."

Section 404(b), 49 U.S.C. Sec. 1374(b) (1970):

"(b) No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 801, 49 U.S.C. Sec. 1461 (1970):

"The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 1372 of this title, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be trans-

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mitted to the President by the Board before hearings thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof."

Section 1006(a), 49 U.S.C. Sec. 1486(a) (1970):

"Any order, affirmative or negative, issued by the Board or Administrator under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 1461 of this title, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore."

STATEMENT

On November 21, 1972, South African Airways (hereinafter SAA) filed with the Civil Aeronautics Board (hereinafter CAB) an application for an amended foreign air permit authorizing it to serve a new route between Johannesburg, South Africa and New York. Petitioners in this case[1] filed a request to appear as Joint Intervenors in the

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[1] Petitioners include fifteen black members of the United States House of Representatives (Charles Coles Diggs, Yvonne B. Burke, Shirley Anita Chisholm, William Lacy Clay, John Conyers, Ronald V. Dellums,

(continued)

Board proceedings. This request was granted on February 26, 1973.

At a prehearing conference held on February 22, 1973, petitioners requested, *inter alia,* information regarding possible discriminatory policies of SAA directed at black Americans traveling on SAA continuation flights in South Africa bookable in the United States and at SAA facilities in South Africa. Upon the denial of these requests by the Administrative Law Judge, petitioners noted their objections and requested leave to appeal to the Board. Specifically, petitioners maintained that the Board had a statutory duty under the Federal Aviation Act, Secs. 402(a) and (b) and 404(b), 49 U.S.C. Secs. 1372(a) and (b) and 1374(b), to inquire into possible discrimination against black Americans in foreign air transportation. Petitioners' request for leave to appeal was denied.

The hearing before the Administrative Law Judge was held on April 9, 1973. The petitioners participated in this proceeding and repeated their requests for evidence made at the prehearing conference. Despite the rejection of these requests, SAA subsequently presented testimony at the hearing from its Deputy Commercial Director, Frans J. Swarts, concerning the absence of discrimination or segregation on internal SAA flights or in the treatment

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[1] (continued)
Walter E. Fauntroy, Augustus F. Hawkins, Barbara Jordan, Ralph Harold Metcalfe, Parren James Mitchell, Robert N.C. Nix, Charles B. Rangel, Louis Stokes, Andrew Young) and four organizations, the American Committee on Africa, the Black United Front of Washington, D.C., the African Heritage Studies Association, and IFCO-Action, with particular concerns about possible United States involvement in policies of racial discrimination affecting American citizens.

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of black Americans at SAA domestic facilities. Petitioners' requests to introduce rebuttal testimony on these points were denied.

The Administrative Law Judge's recommended decision issued on May 21, 1973, endorsed the grant of SAA's application and made findings of non-discrimination as to SAA internal flights and facilities. Specifically, the decision stated:

> "No facilities at Johannesburg International Airport are segregated on the basis of race, and no facilities at the adjacent domestic airport are restricted racially as to citizens of the United States or citizens of countries other than South Africa. . . . The carrier's witness testified that . . . there is no racial discrimination on any of SAA's domestic flights within South Africa."
>
> (Recommended Decision of Administrative Law Judge Ross I. Newmann, App. 20a).

On May 31, 1973, the petitioners filed exceptions to the Administrative Law Judge's recommended decision. On June 27, 1973, the petitioners filed a brief with the Board, opposing the Administrative Law Judge's recommended decision, emphasizing that they had been denied the opportunity to present evidence on the racial discrimination issue, and requesting oral argument before the Board. Without notice to petitioners, the Board denied their oral argument request, adopted a recommended decision and order dated September 5, 1973, that would grant SAA's application, and forwarded that recommended opinion to the President for his signature.

The opinion of the Board, which was transmitted to the President, adopted the findings, conclusions and

recommendations of the Administrative Law Judge, (App. 6a), including the finding that there was an absence of discrimination against Americans on SAA internal flights or at SAA facilities in South Africa.

> "As the record indicates, the applicant does not discriminate on the basis of race on any of its international flights (SAA Exhibit 10, Tr. 30) and it makes its facilities and accessorial services available on a non-discriminatory basis. There is no racial segregation, for example, with regard to the ground services provided by the carrier between the airport and downtown Johannesburg." (App. 7a).

Having noted these findings regarding SAA's practices which petitioners had repeatedly contested, the Board ruled that it would not exercise its authority to inquire further into possible discrimination against black Americans on SAA's continuation flights or at facilities in South Africa since,

> "[s]uch evaluation would necessarily inject the Board into the complex and delicate diplomatic questions affecting relations between the United States and a friendly foreign nation." (App. 8a).

Thus, the record upon which the President based his decision in this case included findings of non-discrimination which petitioners had repeatedly been denied the opportunity to rebut. The President signed the Board's recommended order on September 28, 1973. Petitioners were served with a copy of the Board's opinion on October 3, 1973.

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Upon petitioners' timely filing of a petition for review with the United States Court of Appeals for the District of Columbia Circuit on November 30, 1973, SAA intervened in these proceedings and moved to dismiss on the basis of Sec. 1006. A decision on this motion was deferred by the Court pending briefing on the merits and oral argument. After oral argument on April 3, 1975, a decision dismissing the petition on jurisdictional grounds was issued on August 4, 1975. The principal basis of this decision was the Court's belief that the language of Sec. 1006 precluded review by the Court of allegations of Board misconduct or constitutional violations when an order with respect to a foreign air carrier subject to Presidential approval was at issue.

REASONS FOR GRANTING THE WRIT

The issue presented by this case is to what extent judicial review in the courts of appeals is forclosed by the Civil Aeronautics Act of 1938. A number of developments suggest the need for a thorough re-examination of this question. These developments include: (1) a succession of conflicting circuit and district court decisions interpreting the *Waterman* doctrine;[2] (2) an expressed Congressional intent that the decision when to review Board action subject to Presidential approval rests exclusively with the several courts of appeals; (3) the redefinition of standards of justiciability in *Baker* v. *Carr*, 369 U.S. 186 (1962) and its progeny; and (4) considerations of sound judicial management and statutory interpretation. Petitioners address each of these considerations *seriatim*.

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[2] *See* Chicago & Southern Airlines, Inc. v. Waterman Steamship Co., 333 U.S. 103 (1948).

I

An appreciation of the contradictory and confusing state of the law applicable to the review of final CAB orders concerning foreign carriers subject to Presidential approval must begin with an understanding of the Court's decision in the *Waterman* case. *Waterman*, which represents the sole statement by the Court to date on this question, held in a 5 to 4 decision that orders in respect to overseas and foreign air transportation subject to Presidential approval are not susceptible to judicial review in the courts of appeals. In reaching this result, the Court reasoned that such orders, regardless of whether they involve United States or foreign carriers, necessarily entail important political considerations and the exercise of Presidential discretion. Both in its legal analysis and its citation of authorities, the Court appeared to be strongly influenced by prevailing judicial attitudes on the foreign affairs and political question doctrines. As the majority opinion states:

> "[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong to the domain of political power not subject to judicial intrusion or inquiry. Coleman v. Miller, 307 U.S. 433,

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> 454; United States v. Curtiss-Wright Export Corp. 299 U.S. 304, 319-321; Oetjen v. Central Leather Co. 246 U.S. 297, 302." 333 U.S., *supra* at 111, 112.

In his dissenting opinion on behalf of four members of the Court, Mr. Justice Douglas, in language particularly relevant to the instant case, noted the implications of denying judicial review of unauthorized Board action:

> "Today a litigant tenders questions concerning the arbitrary character of the Board's ruling. Tomorrow those questions may relate to the right to notice, adequacy of hearings, or the lack of procedural due process of law. But no matter how extreme the action of the Board, the courts are powerless to correct it under today's decision. Thus, the purpose of Congress is frustrated." *Id.* at 117, 118.

The dissent reasoned that Board action beyond the scope of its authority simply does not produce a valid order upon which the President can act, and consequently, allegations of Board action beyond its powers or in violation of the Constitution should be reviewed irrespective of purported Presidential ratification. Although the minority in *Waterman* acknowledged that the case before it dealt with Sec. 801 of the Act and thus did not involve the literal language of Sec. 1006, the logical thrust of the opinion bears equal relevance to foreign carriers as to domestic airlines.

While cases decided shortly after *Waterman* tended to accept the broad prohibitions on review which had been

enunciated in the majority opinion,[3] later cases have adopted the position that judicial review of unauthorized Board action which may threaten constitutional interests is subject to judicial review despite Presidential approval of the order in question. See *Pan American World Airways, Inc.* v. *CAB*, 380 F.2d 770 (2d Cir. 1967), *aff'd by an equally divided Court, World Airways, Inc. v. Pan American World Airways, Inc.*, 391 U.S. 461 (1968); *American Airlines, Inc.* v. *CAB*, 348 F.2d 349 (D.C. Cir. 1965); *Alaska Airlines, Inc.* v. *Pan American World Airways, Inc.*, 321 F.2d 394 (D.C. Cir. 1963).

As the Court of Appeals in the opinion below noted, each of these cases dealt with domestic carriers not subject to the literal language of Sec. 1006. Nevertheless, it is essential to recognize that in none of these decisions did the courts believe it necessary to distinguish their fact situations from those covered by the language of Sec. 1006. For example, Judge, now Chief Justice, Burger writing in the case of *American Airlines* v. *CAB, supra,* concluded, in language which appears as applicable to foreign as to domestic carriers, that:

> "The question immediately before us is whether the *Waterman* principle governs a situation in which a petitioner claims that awards made by the Board, with Presidential approval, exceed the Board's *power* under the act. Stated in another way, does *Waterman* govern a situation where the action of the Board, before the matter reaches the President, is beyond the Board's power to act?

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[3] *See, e.g.*, United States Overseas Airlines, Inc. v. CAB, 222 F.2d 303 (D.C. Cir. 1955).

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> We think not, for in the latter situation there is nothing legally to submit to the President. Clearly *Waterman* presupposes lawfully exercised congressional authority in the Board's action, in the first instance, as an indispensible predicate, without which there is nothing Presidental action can approve." [footnote omitted] 348 F.2d, *supra* at 352.

The *American Airlines* decision went on to review the merits of the allegations of unauthorized Board action. Most importantly, the decision found it unnecessary to distinguish *British Overseas Airways Corp.* v. *CAB*, 304 F.2d 952 (D.C.Cir. 1962), an earlier case in which the Court stated that foreign air carrier permits subject to Presidential approval could not be subjected to judicial review in the courts of appeals. 304 F.2d, *supra* at 952, 953. Rather than distinguish *BOAC* from the *American Airlines* situation, Judge Burger concluded:

> "[S]o far as it may be thought applicable to the instant case our somewhat cryptic observation as to the unavailability of judicial review 'now or later' in *British Overseas Airways Corp.* v. *CAB* . . . is dictum." *American Airlines* v. *CAB*, *supra*, 348 F.2d, at 352.

A similar result was reached by the Second Circuit Court of Appeals in the case of *Pan American World Airways, Inc.* v. *CAB, supra.* Writing for the Court, Judge Hays found it unnecessary to draw any distinction between foreign and domestic carriers in determining that acts beyond the Board's authority were subject to judicial review in the courts of appeals regardless of Presidential approval. The Court reasoned (380 F.2d at 775):

> "We need not decide whether . . . the *Waterman* decision rests on a misinterpretation of § 1006 of the Act . . . providing for judicial review of the Board's orders . . . . We agree with the Court of Appeals for the District of Columbia Circuit that the *Waterman* case does not 'govern a situation where the action of the Board, before the matter reaches the President, is beyond the Board's power to act.' American Airlines v. Civil Aeronautics Board, supra, 348 F.2d at 352."

Despite the strong indication in these cases that judicial review in the courts of appeals would be possible in all future cases of unauthorized Board action, subsequent decisions have appeared to retreat substantially from this view. In *Pan American World Airways, Inc.* v. *CAB*, 392 F.2d 483, 494 (D.C.Cir. 1968), for example, the Court, in obiter dictum, suggests, not only that Sec. 1006 would bar review by courts of appeals of foreign carrier permits subject to Presidential approval, but also that review in such circumstances might be difficult to obtain before district courts as well.

The three most recent decisions on this question prior to the instant case, *Dan-Air Services, Ltd.* v. *CAB*, 475 F.2d 408 (D.C. Cir. 1973); *Overseas National Airways, Inc. v. CAB*, 426 F.2d 725 (2nd Cir. 1970); and *CAB v. Donaldson Line (Air Services), Ltd.*, 343 F. Supp. 1059 (S.D. N.Y. 1972) have all followed the suggestion made by Judge Wright in his 1968 *Pan American* decision. One of these more recent cases, *CAB* v. *Donaldson Line (Air Services), Ltd., supra,* has added a special note of confusion to an already perplexing situation. The judge in that case apparently applied the statutory bar to review found in

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Sec. 1006 to an original action challenging unauthorized Board action in district court. See *Donaldson Line, supra,* 343 F. Supp. at 1062.

Thus, a review of the applicable case law in the area presents the following picture: three courts of appeals' decisions have suggested the possibility of review of Board action in respect to foreign carrier permits subject to Presidential approval; several other cases have held that only actions in respect to domestic carriers are subject to review; and at least one district court has concluded that no review is permissible of foreign permit actions if Presidential approval is involved. Behind this contradictory body of case law lies this Court's original formulation in *Waterman* which would appear to prohibit review of *any* order subject to Presidential approval. Petitioners submit that the time is appropriate for a re-examination of this important subject.

II

The limitation of judicial review under Sec. 1006, while not surprising given the statute's language, is open to considerable question when one examines the available evidence expressing the intentions of the legislation's principal architects and sponsors. It is particularly instructive, for example, to note that the repeated references to the need for safeguarding executive discretion, which were made by the Administration's spokesman for its bill, draw no distinctions between foreign and domestic carrier routes in foreign and overseas air transportation. In fact, frequent references are made to the need for insulating Presidential discretion in regard to domestic airlines flying over the

United States.[4] It is likewise important to recognize that the drafters of the Administration bill and the early versions of the legislation as introduced in the House specifically reserved for the courts of appeals the right to determine whether a particular question was subject to judicial review or confined to Presidential discretion. See House Hearings, *supra* at 53, 54.

The legislative history of the 1938 Act compels the conclusion that the purpose of Secs. 1006 and 801 taken together was to incorporate a still nascent and evolving judicial approach to the political question and foreign affairs power doctrines into the statute. In fact, the Administration's drafts of the bill and the House Reports on its version of the legislation expressed this position explicitly by noting that courts would determine their own competence to review final Board actions.[5] Nothing in the subsequent legislative history contradicts this interpretation of the statute.

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[4] *See in particular* the comments of Clinton M. Hester, Assistant Secretary of Treasury at Hearings on H.R. 9738, To Create a Civil Aeronautics Authority, Before the House Committee on Interstate and Foreign Commerce, 75th Cong., 3rd Sess. (hereinafter House Hearings), at 37-41 and 147-148, and at Hearings on S. 3760, To Create a Civil Aeronautics Authority, Before the Senate Commerce Committee, 75th Cong., 3d Sess. at 6, 7.

[5] *See* draft of H.R. 9738 introduced by Congressman Lea, House Hearings, *supra* at 25-30. The colloquy between Assistant Secretary Hester and Congressman Mapes at 53-54 of the House Hearings, *supra* confirms this view. Further, the Report on H.R. 9738, which passed the House, states that "[u]pon final decree the courts of appeals can take whatever action may be appropriate to the case within their constitutional powers by ordering further proceedings or otherwise. Such final decrees would be subject to review by the Supreme Court." H. Rep. 2254, from the Committee on Interstate and Foreign Commerce, on H.R. 9738, 75th Cong., 3rd Sess., April 28, 1938 at 11.

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Seen in this light, the final language of the statute does no more than reflect the attitude that courts had historically taken to questions of executive discretion prior to 1938. This interpretation of Congressional intent is entirely consistent with the *Waterman* opinion, which makes no distinction between United States and foreign carriers in discussing the application of Presidential discretion.

III

A restrictive interpretation of Sec. 1006 that prohibits review of all air permit decisions subject to Presidential approval may be reasonable so long as such interpretation remains consistent with prevailing notions of justiciability.[6] However, a truly anomalous situation has been created today when rigid formulations of the political question and foreign affairs power doctrines have been replaced by new concepts of justiciability set forth in *Baker* v. *Carr*, 369 U.S. 186 (1962). Under this case and its progeny, any assertion of non-justiciability based upon political question or foreign affairs considerations is to be subjected to a "discriminating analysis" according to specific standards which have been fully articulated in the *Baker* opinion at 217. These standards require the examination of possible political or foreign policy consequences of review in each case presented and the rejection of uncritical deference to claims of administrative or executive discretion.

Since in the instant case, petitioners challenge solely the refusal of the Board to hear evidence of discrimination, in circumstances where SAA's evidence of non-discrimination was introduced and incorporated in the Board's find-

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[6] Thus the Waterman majority cites with approval a number of cases which strictly circumscribe the power of courts to scrutinize Executive decisions once a question of politics or foreign policy has been raised. See cases cited in Waterman, *supra* 333 U.S. at 111, 112.

ings, no foreign affairs interest or issue of Presidential discretion is involved. Petitioners do not question in this proceeding the power of the President to authorize the route in question once an adequate record has been created by the Board. Nor do petitioners maintain that the current operation of the route in question need necessarily be suspended pending a new hearing before the Board.

Because no possible foreign affairs interest can be identified in the instant case under prevailing standards of justiciability, there is no policy reason for denial of review of petitioners' claims in the Court of Appeals. If Congress clearly intended that courts apply their own evolving standards of justiciability, a reading of the statute to preclude a review in circumstances such as this is both unwarranted and a serious distortion of legislative intent.

IV

The evolution of the *Waterman* doctrine from 1948 to the present has created insurmountable barriers to judicial review of Board misconduct or unconstitutional action. The courts of appeals, which have been legislatively designated as the review authority in CAB cases, have, with a few notable exceptions, refused to act on such allegations in the belief that they are limited by statutory language as construed, expressly or impliedly, by *Waterman.* At the same time, district courts are uncertain as to the scope of their authority and litigants are left without even minimal guidelines as to the appropriate forum – or whether there is any forum – for the resolution of their complaints. Basic tenets of judicial management urge that this situation be clarified.

In the instant case, the Court of Appeals followed the precedents limiting Sec. 1006 to its literal terms. The Court

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also cited two additional cases for the proposition that the clear language of a statute does not permit review of legislative intent or policy. See *Caminetti* v. *United States*, 242 U.S. 470 (1917) and *March* v. *United States*, 506 F.2d 1306 (D.C.Cir. 1974). This uncritical resort to the plain meaning rule conflicts sharply with this Court's frequently stated view that the intention of Congress, considerations of policy, and the purpose of legislation should be consulted in circumstances where a literal interpretation of a statute produces an unreasonable result. *Philbrook* v. *Glodgett*, 95 S.Ct. 1893, 1898 (1975); *Cass* v. *United States*, 417 U.S. 72, 77-79 (1974); *Markham* v. *Cabell*, 326 U.S. 404, 409 (1945); *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 543-544 (1940); *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 459 (1892).[7]

The effect of the lower court decision in the instant case is to require petitioners to institute a new proceeding in district court with no assurance that the barrier of Sec. 1006 will not be raised there again. Regardless of the outcome of a district court proceeding, the issues of this case will undoubtedly be presented to the Court of Appeals through the appeal of the losing party. Given current standards of justiciability, and the intent of Congress in passing the 1938 Act, such a result is clearly unreasonable.

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[7] The restrictive view of Sec. 1006 adopted below also stands in sharp contrast to the general hesitancy this Court has shown to limit the scope of judicial review of agency action. *See, e.g.*, Barlow v. Collins, 397 U.S. 159, 166-167 (1970); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Leedom v. Kyne, 358 U.S. 184, 190 (1958).

CONCLUSION

The urgency of review by this Court in the present case is, if anything, greater than in past instances where Board action has been asserted to be beyond statutory authorization or constitutional bounds. In the instant case, we confront not conventional questions of economic rights, but rather the basic issue of possible governmental participation in acts of racial discrimination and a significant question of procedural due process.[8] The implications of the Court of Appeals' decision in this case for future aviation litigation are most grave: a federal agency may now be insulated from judicial review of unauthorized procedural and substantive actions which have the effect of placing before the President erroneous findings of fact on a highly sensitive issue. The process by which Presidential discretion might legitimately be exercised may be corrupted by unauthorized Board action if judicial review is denied.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 1975

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[8] The denial to one party at a CAB hearing of the opportunity to present evidence in rebuttal of evidence introduced by another party has been held to violate due process. *See* Northeast Airlines, Inc. v. CAB, 345 F.2d 484 (1st Cir. 1965).

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APPENDIX A

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Charles Coles DIGGS et al., Petitioners,

v.

CIVIL AERONAUTICS BOARD, Respondent,

South African Airways, Intervenor.

No. 73-2194.

United States Court of Appeals, District of Columbia Circuit.

Argued April 3, 1975.

Decided Aug. 4, 1975.

Judgment entered this date

An appeal was taken from an order of the Civil Aeronautics Board, approved by the President, authorizing a foreign airline to service a new route between South Africa and New York. The Court of Appeals held that under a Federal Aviation Act section providing for original jurisdiction of the Courts of Appeals to review orders of the Board but excepting any order in respect of any foreign air carrier subject to the approval of the President, the Court of Appeals did not have original jurisdiction to review the order, despite the contention that the order was invalid and that invalidity could not be cured by presidential approval.

Petition dismissed.

Aviation ⇐77

Under Federal Aviation Act section providing for original jurisdiction of Courts of Appeals to review orders of the Civil Aeronautics Board but excepting any order in respect of any foreign air carrier subject to the approval of the president, Court of Appeals, did not have original jurisdiction to review CAB order, approved by the president, authorizing foreign airline to serve new route between South Africa and New York, despite contention that order was invalid and that invalidity could not be cured by presidential approval. 28 U.S.C.A. § 294(d); Federal Aviation Act of 1958, §§ 101(19), (21)(c), 402, 402(b), 404(b), 1006(a), 49 U.S.C.A. §§ 1301(19), (21)(c), 1372, 1372(b), 1374(b), 1461, 1486(a).

Petition for Review of an Order of the Civil Aeronautics Board.

Roderic V. O. Boggs, Washington, D. C., with whom Goler Teal Butcher and

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Vaughn C. Williams, Washington, D. C., were on the brief for petitioners.

Barbara Thorson, Atty., Civ. Aeronautics Bd., with whom Thomas J. Heye, Gen. Counsel, O. D. Ozment, Deputy Gen. Counsel, Glen M. Bendixsen, Associate Gen. Counsel, Litigation and Research, Civ. Aeronautics Bd., and Carl D. Lawson, Atty., Dept. of Justice, were on the brief for respondent.

Brice M. Clagett, Washington, D. C., was on the brief for intervenor.

Before ROBINSON and ROBB, Circuit Judges, and SOLOMON,* Senior United States District Judge for the District of Oregon.

Opinion Per Curiam.

PER CURIAM:

Petitioners, members of the House of Representatives and four associations who represent the interests of black Americans, appeal from an order of the Civil Aeronautics Board (CAB), which authorized South African Airways (SAA) to serve a new route between Johannesburg, South Africa, and New York. The order was adopted under Section 402 of the Federal Aviation Act, 49 U.S.C. § 1372, and approved by the President under Section 801 of the Act, 49 U.S.C. § 1461.

Petitioners assert that the CAB's order violated Sections 402(b) and 404(b) of the Act, 49 U.S.C. §§ 1372(b) and 1374(b). They contend that these sections prohibit the CAB from issuing a permit to a foreign air carrier which discriminates among its passengers on a racial basis and that the CAB violated these sections by refusing to hear evidence that SAA discriminates against blacks on its domestic connecting flights and in its facilities in South Africa.

This Court's original jurisdiction to review CAB orders is limited by Section 1006(a) of the Act, 49 U.S.C. § 1486(a). That section provides that an "order in respect of any foreign air carrier subject to the approval of the President" is not reviewable. Under Section 101(19) of the Act, 49 U.S.C. § 1301(19), a foreign air carrier is defined as "any person, not a citizen of the United States, who undertakes . . . to engage in foreign air transportation." Under Section 101(21)(c) of the Act, 49 U.S.C. § 1301(21)(c), foreign air transportation is defined as "the carriage by aircraft of persons . . . between . . . a place in the United States and any place outside thereof . . .."

CAB and SAA have moved to dismiss the petition for review on the ground that Section 1006(a) is a jurisdictional bar. Petitioners argue that when the CAB submits an order that is invalid on constitutional or statutory grounds—alleged to be the situation here—Presidential approval will not cure the defect. We are therefore urged to construe Section 1006(a) so that we may consider this petition even though the challenged order was subject to Presidential approval and was so approved.

The explicit language of Section 1006(a) does not permit such interpretation. *See* Caminetti v. United States, 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442 (1917); March v. United States, 165 U.S.App.D.C. 267, 274, 506 F.2d 1306, 1313 (1974). An examination of the statutory language, particularly when there is no relevant legislative history, persuades us that Section 1006(a) was intended to mean what it says. Petition-

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

ers place their principal reliance on American Airlines, Inc. v. CAB, 121 U.S. App.D.C. 120, 348 F.2d 349 (1965), and Pan American World Airways, Inc. v. CAB, 380 F.2d 770 (2d Cir. 1967), aff'd by an equally divided Court, 391 U.S. 461, 88 S.Ct. 1715, 20 L.Ed.2d 748 (1968), but neither case supports petitioners. Neither allows judicial review otherwise prohibited by the express language of the statute. Instead, both of them limit the extent to which Section 1006 is to be expanded beyond its literal language and prohibit review of CAB action involving domestic as distinguished from foreign carriers engaged in foreign air transportation. Indeed, Judge J. Skelly Wright, in a previous decision by this court, Pan American World Airways, Inc. v. CAB, 129 U.S.App.D.C. 159, 392 F.2d 483 (1968), distinguished *American Airlines* and the earlier *Pan American* case from cases involving foreign air carriers.[1]

We hold that the clear and unambiguous language in Sections 1006(a), 101(19) and 101(21)(c) of the Act deprives us of jurisdiction to review the challenged order. British Overseas Airways Corp. v. CAB, 113 U.S.App.D.C. 76, 304 F.2d 952 (1962); Dan-Air Services, Ltd. v. CAB, 154 U.S.App.D.C. 297, 300–301, 475 F.2d 408, 411–412 (1973). Accordingly, we do not reach the merits of petitioners' constitutional contentions, nor do we decide whether the District Court has jurisdiction over this action. *See* Pan American World Airways, Inc. v. CAB, 129 U.S. App.D.C. 159, 170, 392 F.2d 483, 494 (1968).

Petition dismissed.

1. He found that "[t]he cases have not dealt squarely with the explicit 'foreign air carrier' jurisdictional bar of Section 1006 itself. . . ." 129 U.S.App.D.C. at 167, 392 F.2d at 491.

Judge Wright went on to say:

"Both *American Airlines* and *Pan American World Airways* involved orders with respect to *citizen* air carriers subject to Presidential approval. Consequently, in those cases any putative limitation on direct Circuit Court review stems from the Waterman [Chicago & Southern Airlines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 68 S.Ct. 431, 92 L.Ed. 568 (1948)] gloss on Section 1006, not from Section 1006 itself; for in *Waterman* non-reviewability is premised merely on Presidential approval, not on explicit statutory language.

. . . . . .

"But where a foreign air carrier is involved, the issue is not whether the reach of a statute should be extended beyond its apparent coverage because of considerations of national defense and foreign policy; rather it is whether an exception should be carved from the plain language of the statute itself. Certainly *American Airlines* and *Pan American World Airways* are not dispositive where this latter question is at issue. And in *British Overseas Airways Corp.*, which did involve the reviewability of an order with respect to a foreign air carrier, relying on the plain language of Section 1006 we said that there could be no direct review in this court 'now or later.'" 129 U.S. App.D.C. at 169, 392 F.2d at 493.

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APPENDIX B

73-10-2

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

- - - - - - - - - - - - -

DOCKET 24944 Served: October 3, 1973
SOUTH AFRICAN AIRWAYS

- - - - - - - - - - - - -

Decided: September 5, 1973

Foreign air carrier permit held by South African Airways amended to authorize the carrier to serve a new route via Sal Island and Las Palmas between the existing terminal points Johannesburg, South Africa, and New York, subject to conditions.

APPEARANCES:

Same as in the recommended decision and, in addition, the following:

David S. Tatel and *Vaughn C. Williams* for the Joint Intervenors

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OPINION

BY THE BOARD:

South African Airways, an air carrier of the Republic of South Africa, has filed an application seeking amendment of its foreign air carrier permit so as to enable it to engage in foreign air transportation between the terminal point Johannesburg, South Africa, the intermediate points Sal Island and/or Las Palmas, and the terminal point New York.[1] Provision for the operation of the

[1] The carrier's current authority permits it to operate between New York and South Africa via Rio de Janeiro.

new route is made in the bilateral agreement between the United States and the Republic of South Africa and the carrier has been designated by its Government to operate the route.

Following a public hearing, Administrative Law Judge Ross I. Newmann issued a decision in which he recommended that the carrier's permit be amended as requested in its application. Exceptions to the recommended decision have been filed by a group denominated the Joint Intervenors[2] and by the applicant. Briefs to the Board were filed on June 27, 1973 by the applicant and the Joint Intervenors. The Bureau of Operating Rights adopted its brief to the Administrative Law Judge. A request for oral argument has been made by the Joint Intervenors.

Upon consideration of the matters presented, the Board has decided to follow the Administrative Law Judge's recommendation.[3] Except to the extent modified herein,

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[2] The Joint Intervenors include the American Committee on Africa; the Black United Front of Washington; the African Heritage Studies Association; IFCO-Action; and the following members of the House of Representatives: Shirley A. Chisholm, William L. Clay, John Conyers, Ronald V. Dellums, Charles C. Diggs, Walter E. Fauntroy, Augustus F. Hawkins, Barbara Jordan, Ralph H. Metcalfe, Parren J. Mitchell, Robert N.C. Nix, Charles B. Rangel, Louis Stokes, and Andrew Young.

[3] We shall affirm his decision to limit the new authority to the terminal point Johannesburg. The carrier's application requested new authority only to Johannesburg and an expansion of the terminal point description at this stage is strongly opposed. Moreover, the applicant has indicated its current intention to operate only from Johannesburg and stated that it would accept a permit limited to that point (Tr. 19, 31-32). Under all these circumstances, we shall follow the recommendation of Judge Newmann.

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the Board adopts as its own the findings, conclusions, and recommendations of the Administrative Law Judge; his recommended decision is attached as an appendix.[4] We have also decided to deny the request for oral argument since the matters presented involve questions of law and policy which have been fully presented on brief.

The basic argument now presented by the Joint Intervenors concerns the Administrative Law Judge's exclusion of evidence concerning (a) the applicant's racial practices on intra-South Africa connecting flights which are utilized by passengers with through tickets from New York to a point in South Africa other than Johannesburg, (b) the racial practices at domestic airport facilities in South Africa utilized by these passengers, and (c) the racial practices at other facilities utilized by these passengers in connection with charter services, when such facilities are arranged by the applicant. See Prehearing Conference Report, February 23, 1972, and Supplemental Prehearing Conference Report, March 8, 1972. The Joint Intervenors argue that consideration of these three excluded matters is necessary and relevant to a proper Board determination of the issues in this proceeding. They request either a denial of the carrier's application or a remand for further hearing.

We find no error in the Administrative Law Judge's ruling which would require either denial of the carrier's application or remand of this proceeding for further hearing. Under the Act, the Board is required to appraise the

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[4] We will clarify slightly the stipulated charter condition contained in the proposed permit. In so doing, however, it is not our intention to alter the substance of the proposed condition.

transportation authority requested in a carrier's application and determine whether such transportation can be performed in conformance with statutory requirements and the public interest. The transportation requested to be performed by South African Airways includes new services between New York and Johannesburg via Sal Island and/or Las Palmas, and the evidence supports Judge Newmann's finding that the applicant will perform these services in conformity with the Act and the public interest. As the record indicates, the applicant does not discriminate on the basis of race on any of its international flights (SAA Exhibit 10, Tr. 30) and it makes its facilities and accessorial services available on a non-discriminatory basis. There is no racial segregation, for example, with regard to the ground services provided by the carrier between the airport and downtown Johannesburg. (Tr. 26-27). It also appears that the facilities and services utilized by the carrier and its passengers at the international section of Jan Smuts Airport in Johannesburg are available to all on an equal basis (Tr. 23-26).

The Board appreciates that under established international practice a carrier may link its operations under a permit issued by the Board to its operations within its home country. However, the Board does not consider that the existence of this behind-gateway ancillary authority makes it incumbent upon the Board to examine, in the course of a permit proceeding, the nature of the service the applicant provides to its passengers within its own home country.[5] Similarly, the Board does not believe it is required to examine the full range of facilities which

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[5] Rather, such service is generally conducted pursuant to, and in accordance with, the laws of that country.

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may be used by U.S. citizens visiting a foreign country.[6] The effect of such examination would be to require the Board to evaluate the activities of a foreign carrier within its home country and to pass judgment on the internal policies of a foreign government. Such evaluation would necessarily inject the Board into the complex and delicate diplomatic questions affecting relations between the United States and a friendly foreign nation. In our judgment, such involvement would neither be practicable nor redound to the benefit of the public interest. See *Pan American World Airways* v. *C.A.B.*, 392 F.2d 483 (D.C. Cir 1968); see *McCullouch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963); *Foley Bros. Inc.* v. *Filardo* 336 U.S. 281 (1949); *South African Airways* v. *N.Y. State Division of Human Rights*, 315 N.Y.S. 2d 651 (Sup. Ct. 1970). In these circumstances, the Board does not believe that it should utilize whatever authority it may possess under sections 402 and 404 of the Federal Aviation Act to reach, directly or indirectly, activities conducted in an applicant's home country when those activities are not dependent upon Board authorization. Thus, however deeply the Board may deplore the racial policies and practices involved, it finds itself in agreement with the Administrative Law Judge that the scope of the Board's inquiry should be limited in this case to an examination of those international services specifically authorized in the applicant's amended permit.

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[6] We have, of course, examined the international airport facilities at Johannesburg which are used by the applicant in the provision of its U.S.-South Africa service and we agree with Judge Newmann that the record shows that such facilities will be available to all U.S. citizens on an equal basis.

In view of the foregoing and all the facts of record, the Board finds:

1. That it is in the public interest to amend the foreign air carrier permit held by South African Airways so as to authorize the carrier to engage in foreign air transportation between the terminal point Johannesburg, South Africa, the intermediate points Sal Island and Las Palmas, and the terminal point New York.

2. That the public interest requires that the exercise of the privileges granted by said permit shall be subject to the terms, conditions, and limitations contained in the form of permit attached to the accompanying order, and to such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

3. That South African Airways is fit, willing, and able properly to perform the above-described foreign air transportation and to conform to the provisions of the Act, and the rules, regulations, and requirements of the Board thereunder.

4. That except to the extent granted herein, the application, and all other requests in this proceeding, should be denied.

An appropriate order will be entered.

TIMM, Chairman, GILLILLAND, Vice Chairman, MINETTI and MURPHY, Members of the Board, concurred in the above opinion.

APPENDIX

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

SOUTH AFRICAN AIRWAYS
FOREIGN AIR CARRIER PERMIT AMENDMENT
JOHANNESBURG-SAL ISLAND-LAS PALMAS-NEW YORK
DOCKET 24944

RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE ROSS I. NEWMANN

Served: May 21, 1973

Upon:

Brice M. Clagett, Covington & Burling, 888 Sixteenth Street, N.W., Washington, D.C. 20006, for South African Airways.

Barry M. Smoler, Shaw, Pittman, Potts & Trowbridge, 910 Seventeenth Street, N.W., Washington, D.C. 20006, for Overseas National Airways, Inc.

Peter J. Connell, 733 Fifteenth Street, N.W., Washington, D.C. 20005, for the Joint Intervenors.

Jerome B. Blum, Civil Aeronautics Board, 1825 Connecticut Avenue, N.W., Washington, D.C. 20428, for Bureau of Operating Rights.

Exceptions, if any, must be filed with the Docket Section, Civil Aeronautics Board, Washington, D.C. 20428, and served upon all parties within 10 days from the date of service shown above. Briefs in support of exceptions may be filed and served upon all parties within 20 days after the date fixed for filing exceptions.

* * * * *

Recommended that South African Airways' foreign air carrier permit be amended to authorize that carrier to engage in foreign air transportation of persons, property, and mail between Johannesburg, South Africa, Sal Island and/or Las Palmas, and New York, New York, subject to conditions.

Appearances:

Brice M. Clagett and *Cary W. Dickieson* for South African Airways.

Peter J. Connell and *Steven Bordsky* for the Joint Intervenors.

Elaine Bloomfield for the Equal Employment Opportunity Commission.

Jerome B. Blum for the Bureau of Operating Rights.

RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE ROSS I. NEWMANN

This proceeding involves the application of South African Airways (SAA), Docket 24944, for an amendement of its foreign air carrier permit to carry persons, property and mail between Jan Smuts Airport, Johannesburg, Sal Island and/or Las Palmas, and J.F. Kennedy Airport, New York. The application also requested authority to engage in off-route charter operations pursuant to Part 212 of the Board's Regulations.[1] Permission to intervene has been granted to Overseas National Airways, Inc., and to 15 members of Congress who are members of the Black Congressional

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[1] Authority to conduct off-route charters was granted to SAA in Order 68-11-41, dated November 7, 1968.

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Caucus;[2] the American Committee on Africa; the Black United Front of Washington, D.C.; the African Heritage Studies Association; and IFCO-Action (hereinafter referred to as the Joint Intervenors).

Public hearing was held in Washington, D.C., on April 9, 1973. Briefs to the Administrative Law Judge were filed on May 7, 1973, by SAA, the Joint Intervenors, and Bureau Counsel. Overseas National did not appear at the hearing, did not present any exhibits, and did not file a brief. Pursuant to a stipulation between SAA and Overseas National dated March 8, 1973, SAA agreed to accept the following restriction in its permit:

> "The authority granted to South African Airways in this permit does not include authority to perform on-route charter transportation of passengers between New York, on the one hand, and Las Palmas, on the other hand, but this restriction does not preclude on-route charter transportation of passengers between New York and Johannesburg with one or more non-traffic stops (of unlimited duration) in Las Palmas."

In the light of this stipulation, Overseas National agreed that it would not oppose SAA's application in this proceeding and that it would not participate in any further procedural steps in this case.

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[2] Members of the Black Congressional Caucus are Charles Coles Diggs, Yvonne Brathwaite Burke, Shirley Anita Chisholm, William Lacy Clay, John Conyers, Ronald V. Dellums, Walter E. Fauntroy, Augustus F. Hawkins, Barbara Jordan, Ralph Harold Metcalfe, Parren James Mitchell, Robert N.C. Nix, Charles B. Rangel, Louis Stokes, and Andrew Young.

The Equal Employment Opportunity Commission (EEOC) appeared at the hearing pursuant to Rule 14 of the Board's Rules of Practice and submitted a Statement of Position. EEOC takes no position on the merits but submitted its Statement in order to offer the Administrative Law Judge a general discussion of fair employment law so the parties can better understand the Title VII issue raised in this proceeding.

THE ISSUES

The issues in this proceeding are as follows:

1. Will the foreign air transportation proposed by the application of South African Airways be in the public interest?

2. Is the applicant substantially owned and effectively controlled by citizens of the Government of the Republic of South Africa?

3. Is the applicant fit, willing, and able to properly perform the foreign air transportation proposed in its application and to conform to the provisions of the Federal Aviation Act of 1958, as amended, and the rules, regulations, and requirements of the Board thereunder?

4. Is the applicant in compliance with Titles II and VII of the Civil Rights Act of 1964, and sections 404(b) and 411 of the Federal Aviation Act of 1958, as amended?

5. If the application is granted, what should be the duration of the permit and what other terms, conditions, and limitations, if any, should be attached thereto?

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THE BILATERAL AGREEMENT

The route annex to the Air Transport Agreement between the United States and the Republic of South Africa, as amended by exchanges of notes effective on May 23, 1947, and June 28, 1968, provides for designated airlines of the Republic of South Africa to operate two routes. Route numbered "1" is described as "South Africa via points in Africa south of the Equator, the Cape Verde Islands, the Canary Islands, Spain*, and Portugal* to New York." The Government of the Republic of South Africa has designated SAA to conduct air services on said route and the route embraced by SAA's application involved herein conforms to said route numbered "1" except that it is limited to Johannesburg, South Africa.

THE APPLICANT

SAA holds a foreign air carrier permit issued by the Board, pursuant to Order 68-11-41[3] to engage in (a) the foreign air transportation of persons, property, and mail between a point or points in the Republic of South Africa, the intermediate point Rio de Janeiro, Brazil, and the terminal point New York, N.Y., and (b) off-route charter trips in foreign air transportation, subject to the terms, conditions, and limitations prescribed by Part 212 of the Board's Economic Regulations.

SAA presently operates one roundtrip flight per week between Johannesburg and New York via Rio de Janeiro.

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* Without traffic rights beween points in these countries and New York.

[3] South African Airways, Docket 20054, approved by the President on November 7, 1968.

Since the inauguration of this service in February 1969, SAA has carried more than 13,000 passengers and nearly two million pounds of cargo and mail.

SAA proposes to continue to operate its present flight via Rio de Janeiro, departing Johannesburg Saturday morning for arrival in New York Saturday evening, and departing New York late Monday morning for arrival in Johannesburg Tuesday afternoon. The new flight via Ilha do Sal would depart Johannesburg Thursday evening for arrival in New York Friday morning and depart New York Friday afternoon for arrival in Johannesburg Saturday afternoon. The new route will be 1200 statute miles shorter than the old, and the schedules are faster by more than two hours eastbound and three hours westbound.

SAA plans to utilize Boeing 707-320B and 707-320C aircraft, seating 16 first class and 123 economy class passengers. When the volume of cargo requires, the aircraft can also be operated in a combined passenger/freighter service with three cargo pallets and 108 passenger seats. The applicant has no plans at this time to use wide-body equipment on either its present or proposed route. SAA will charge the rates and fares which have been approved by IATA for the new route.

In 1972, SAA's revenues exceeded $175 million annually and its identifiable assets were in excess of $380 million. SAA's fleet consists of 5 Boeing 747 aircraft, 8 Boeing 707s, 9 Boeing 727s, 6 Boeing 737s, and 3 Hawker Siddeley 748 aircraft. All of these planes are wholly owned by SAA and were paid for in full on the date of delivery.

SAA's headquarters in the United States are located in New York. It also has offices in Chicago, Houston, Los

Los Angeles, and San Francisco.

SAA is owned and controlled by nationals of the Republic of South Africa and is an instrumentality of the Government of South Africa. All of SAA's officers have extensive experience in transportation and aviation and all are South African citizens. None has any direct interest in any other carrier, foreign air carrier, other common carrier, or business engaged in a phase of aeronautics.

POSITIONS OF THE PARTIES

SAA.

SAA takes the position that the proposed service is in the public interest, that it is fit, willing, and able to perform the proposed service, and that its application should be granted in the form it has requested below. It contends that its employment practices in the United States are not discriminatory, that it does not discriminate in its services in foreign air transportation, and that its advertising policies have not been in violation of section 411 of the Act. SAA therefore sees no need to impose a condition relating to advertising, as suggested by Bureau Counsel. SAA also opposes a condition suggested by the Bureau which would allow the Board, its agents and auditors access to all facilities in, or records required to be kept in, the United States. Finally, SAA urges that its permit be amended to designate "a point or points" in South Africa as the terminal for the new route, as provided by the bilateral agreement, rather than the designation of Johannesburg, South Africa, as requested in its application.

Joint Intervenors

The Joint Intervenors contend that SAA's application should be denied because the Board is authorized to issue

a permit only if it finds the applicant fit, willing, and able and that the proposed transportation will be in the public interest. They argue that facts bearing upon the racially discriminatory visa policies of the South African Government and racial segregation of passengers in foreign air transportation within South Africa are crucial to the Board's determinations. Requests by the Joint Intervenors to submit evidence on those issues, the Joint Intervenors contend, were denied and consequently the Board is not in a position to decide whether SAA is fit, willing, and able to perform such transportation or whether such transportation would be in the public interest.

Bureau of Operating Rights.

The Bureau believes that approval of the application is in the public interest, that SAA is fit, willing, and able to perform the proposed service, and that SAA's permit should be amended to authorize scheduled foreign air transportation between New York and Johannesburg via Sal Island and/or Las Palmas. BOR takes the position that the evidence in this proceeding does not indicate that SAA is in violation of Titles II and VII of the Civil Rights Act of 1964 and/or sections 404(b) and 411 of the Federal Aviation Act of 1958, as amended.

FINDINGS AND CONCLUSIONS

The Board has consistently held that where an outstanding bilateral agreement provides for the routes in question, it is normally in the public interest to grant the permit unless sufficient reasons are shown to establish that such grant would be contrary to the public interest. Thus, the existence of the bilateral agreement and the designation of a carrier thereunder constitute highly significant evidence

bearing upon the public interest which, except in extraordinary circumstances, lies with the faithful adherence to our international agreements.[4] It is necessary to examine the factual record in this case in order to determine whether there are extraordinary circumstances which require that SAA's application be denied.

The proposed route was provided for in the bilateral air transport agreement between the Republic of South Africa and the United States, and the Republic of South Africa has designated SAA to operate the route. The record shows that SAA is an instrumentality of the Government of South Africa, and the scope of its present operations, the size and quality of its aircraft fleet, its experienced management and financial strength, insurance coverage, and good safety record make it well qualified to operate the proposed route.

The Joint Intervenors contend that the Board is not in a position to decide whether SAA is fit, willing, and able because certain requests by the Joint Intervenors for the submission of evidence bearing upon racially discriminatory visa policies and racial segregation of passengers within South Africa were denied. The contention of the Joint Intervenors is wholly without merit and must be rejected.

The issues in this proceeding specifically included the question whether SAA is in compliance with section 404 (b) of the Federal Aviation Act. Under this provision, the Board is empowered to prevent discrimination in air transportation. The Joint Intervenors, however, sought to

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[4] *British Overseas Airways Corporation, Foreign Permit Amendment,* 29 C.A.B. 583 (1959); *Eagle Airways (Bahamas) Ltd.,* 33 C.A.B. 222 (1960).

use this proceeding as a forum to inquire into the policies and practices of the South African Government relating to visa applications as well as the questions of racial discrimination and employment practices within South Africa. This is not the proper proceeding to resolve these questions. Any attempts to deal with another government's general racial or religious practices, as distinguished from discrimination in air transportation, should be the subject of a single overall U.S. policy. In the absence of enactment by the Congress of an overall government policy, only the President can fashion a policy covering not only the Board but other government agencies as well.

It is the Board's responsibility, however, in considering the applicant's fitness, to carefully examine the facts to determine whether the applicant has conformed to the provisions of the Federal Aviation Act and other related statutes, including the Civil Rights Act of 1964, insofar as its operations in foreign air transportation are concerned. Detailed evidence was submitted in this proceeding bearing upon SAA's employment practices in the United States and matters of discrimination in foreign air transportation. In addition, evidence was submitted relating to SAA's advertising practices to determine whether the applicant has complied with section 411 of the Federal Aviation Act.

Discrimination.

The evidence of record demonstrates that SAA does not discriminate racially or on any other basis in any of the services or facilities it employs in foreign air transportation. SAA has not restricted, and its witness testified that it does not intend to restrict, any person desiring to travel to or from the United States from using its services so long as that person is in possession of the travel documents

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required by the country of destination. It has transported, and asserts it will continue to transport, nonwhite passengers on its aircraft. It does not distinguish in any manner based on race among passengers travelling on its flights in foreign air transportation. No facilities in any of SAA's aircraft or flights in foreign air transportation are segregated by race.

The record also shows that there is no discrimination as to United States citizens at facilities utilized by SAA in South Africa on its flights to or from the United States. No facilities at the Johannesburg International Airport are segregated on the basis of race, and no facilities at the adjacent domestic airport are restricted racially as to citizens of the United States or citizens of countries other than South Africa. Bus transportation to and from Johannesburg or Pretoria which is provided by SAA does not discriminate among passengers on the basis of race. The carrier's witness testified that even though SAA's domestic flights are not part of foriegn air transportation and are not involved in the present application, there is no racial discrimination on any of SAA's domestic flights within South Africa.

Title VII of the Civil Rights Act of 1964, bars discrimination in employment practices. The record shows that SAA has not discriminated in its hiring practices in the United States on the basis of race, religion, sex or national origin. It has instructed the employment agencies which it utilizes not to discriminate and those agencies have confirmed these instructions. Personnel advertisements placed on SAA's behalf clearly indicate SAA's policy of nondiscrimination.

All final decisions on hiring of personnel in the U.S. are made by SAA's North American manager, Mr. Reginald

G. Brett, who has held that position since SAA received its permit in 1968. He testified that he has never discriminated on the basis of race, religion, sex or national origin in his hiring decisions. He also testified that employees holding equivalent jobs are paid on the same established salary scale, and that salary increases within the scale are based solely on longevitiy. All employees receive the same travel benefits.

Conditions.

Section 411 of the Act prohibits deceptive practices in air transportation. The question was raised in the Prehearing Conference Report whether SAA has, in the past year, in connection with air travel to or from the U.S., advertised facilities that are not uniformly available to all members of the travelling public.

The record shows that over the years the Board's Bureau of Enforcement has maintained a close scrutiny over SAA's advertising. No enforcement proceeding has been instituted against SAA, since any questions that have arisen have been satisfactorily resolved by agreement between SAA and Enforcement. These questions did not relate to the advertising of any services or facilities offered by SAA, but to a few incidental references in SAA advertising to attractions or amenities available to tourists who visit South Africa.

Since 1969, the Bureau of Enforcement has taken the position that SAA should refrain in its advertising from making incidental references to attractions or amenities which are not freely and equally available to all races. SAA has undertaken to abide by such a policy and has instructed its advertising agency accordingly.

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The record in this case demonstrates that SAA has complied with section 411 of the Act in its advertising practices and has cooperated fully with the efforts and inquiries of the Bureau of Enforcement. Under the circumstances, there is no reason to impose a condition in SAA's permit requiring the carrier to refrain from misleading advertising. Any questions which might arise in the future under section 411, or under any other provisions of the Act or the Board's Regulations, can be appropriately dealt with by the Bureau of Enforcement.

Another condition raised by Bureau Counsel prior to the prehearing conference would require SAA to allow access to the Board, its special agents or auditors, to all lands, buildings, equipment, accounts, records, and memoranda kept in the United States. There is no evidence in this record to support the imposition of such a condition, nor is there any indication that the Board has imposed a similar condition on any other foreign air carrier. Under the circumstances, no such condition will be imposed here.

The Bureau has recommended that the Board's standard condition relating to insurance be incorporated in SAA's permit. No objection was raised by SAA and such a condition will be imposed.

The permit will also contain a condition prohibiting SAA from performing on-route charter transportation of passengers between New York and Las Palmas, which implements a stipulation between SAA and Overseas National.

South African Terminal Point.

As previously pointed out, the bilateral agreement provides for a route between a point or points in South

Africa and New York, via intermediate points. The application in this proceeding, however, did not apply for a point or points in South Africa but was limited to the single terminal point of Jan Smuts Airport, Johannesburg. The exhibits submitted by SAA show that service to New York will be provided from the single terminal point Johannesburg. On cross-examination, Mr. F. J. Swarts, Deputy Commercial Director of SAA, testified as follows:

"Q. Your application in this case, Mr. Swarts, seeks authority to operate between the United States via Sal Island and Las Palmas and Johannesburg Airport, correct?

"A. Correct.

"Q. In other words, your proposed operations, if granted the authority you are seeking in this case, would be limited to Johannesburg Airport.

"A. Correct."

On redirect examination, Mr. Swarts testified that SAA's present authority permits flights from any point in South Africa via Rio de Janeiro to New York and the carrier would like to preserve the same option as to flights on the new route. He stated, however, that if the Judge or the Board should rule that since the application specifies only Johannesburg, SAA would accept an amendment of its permit which limits its authority on the new route to Johannesburg.

When questioned at the hearing by the Administrative Law Judge as to legal notice, Counsel for SAA replied:

"If your Honor feels that the difference is enough to raise a problem, then we could certainly

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> accept a permit with only Johannesburg in it, but I assume that wouldn't affect the existing route which already reads any point or points in South Africa. . ."

Counsel for the Joint Intervenors then stated:

> "If there is a possibility that SAA be given authority to any airport in South Africa, or from any airport in South Africa to New York, I would respectfully submit you reconsider your decision excluding intervenors [questions] regarding SAA flights within South Africa and regarding [separate] facilities at airports other than Johannesburg."

On brief, Counsel for SAA points out that in the original proceeding in 1968, SAA applied only for Johannesburg but the permit issued by the Board authorized service to a point or points in South Africa. Counsel asserts this is a long-established policy and should be followed here.

While it is correct that the Board has in the past granted a foreign air carrier broader authority than its application applied for by authorizing service to a point or points in the home country in conformity with the bilateral agreement, the facts in this proceeding do not justify such action. In the original case, no party opposed the award of the permit to SAA. Here, the Joint Intervenors are opposed to SAA's application and objected to the denial of their request to expand the issues to cover internal matters within South Africa.

Section 801 of the Act provides that copies of all applications for amendments of foreign air carrier permits

"shall be transmitted to the President by the Board before hearing thereon. . ." In this case the application which was transmitted to the President was limited to the single point of Johannesburg in South Africa. No application was transmitted to the President requesting a route from a point or points in South Africa. Under the circumstances, the amended permit will conform to SAA's application and will be limited to Johannesburg in South Africa. SAA's existing authority to serve a point or points in South Africa on its route to New York via Rio de Janeiro will of course remain unchanged.

SUMMARY OF FINDINGS AND CONCLUSIONS

On the basis of the foregoing considerations and all the facts of record, it is recommended that the Board find that:

1. It is in the public interest to amend the foreign air carrier permit held by South African Airways to authorize it, for an indefinite period, to engage in foreign air transportation of persons, property, and mail between Johannesburg, South Africa, the intermediate points Sal Island and/or Las Palmas, and the terminal point New York, New York.

2. The applicant is substantially owned and effectively controlled by citizens of the Government of South Africa and is fit, willing and able to properly perform the foreign air transportation proposed in its application and to conform to the provisions of the Federal Aviation Act of 1958, as amended, and the rules, regulations, and requirements of the Board thereunder.

3. The applicant is in compliance with Titles II and VII of the Civil Rights Act of 1964, and sections 404(b)

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and 411 of the Federal Aviation Act of 1958, as amended.

4. The public interest requires that the exercise of the privileges granted by the aforesaid permit shall be subject to the terms, conditions and limitations contained in the accompanying order and the form of permit attached hereto.

A proposed order and permit are attached.

/s/ ROSS I. NEWMANN
Ross I. Newmann
Administrative Law Judge

May 14, 1973
Attachments

Order 73-10-2

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.,
on the 5th day of September, 1973

Application of:	
SOUTH AFRICAN AIRWAYS	Docket 24944
for an amended foreign air carrier permit pursuant to Section 402 of the Federal Aviation Act of 1958	

ORDER

A full public hearing having been held in the above-entitled proceeding, and the Board, upon consideration of the record, having issued its opinion containing its findings, conclusions, and decision;

IT IS ORDERED:

1. That an amended foreign air carrier permit in the form attached hereto be issued to South African Airways;

2. That said permit shall be signed on behalf of the Board by its Secretary, shall have affixed thereto the seal of the Board, and shall be effective upon the effective date of this order;

3. That, except to the extent granted, the application of South African Airways, and all other requests herein, be and they hereby are denied;

4. That this order shall become effective upon the date of its approval by the President of the United States.

By the Civil Aeronautics Board:

(SEAL)
THE WHITE HOUSE
APPROVED:
RICHARD NIXON
September 28, 1973

EDWIN Z. HOLLAND
Secretary

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Issued pursuant to Order 73-10-2

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

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PERMIT TO FOREIGN AIR CARRIER
(as amended)

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SOUTH AFRICAN AIRWAYS

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of the Federal Aviation Act of 1958, and the orders, rules, and regulations issued thereunder, to engage in foreign air transportation with respect to persons, property, and mail, as follows:

1. Between a point or points in the Republic of South Africa, the intermediate point Rio de Janeiro, Brazil, and the terminal point New York, New York.

2. Between Johannesburg, South Africa, the intermediate points Sal Island and Las Palmas, and the terminal point New York, New York.

The holder hereof shall be authorized to engage in charter trips in foreign air transportation, subject to the terms, conditions, and limitations prescribed by Part 212 of the Board's Economic Regulations.

The holder shall conform to the airworthiness and airman competency requirements prescribed by the Government of the Republic of South Africa for South African international air service.

This permit shall be subject to all applicable provisions of any treaty, convention, or agreement affecting interna-

tional air transportation now in effect, or that may become effective during the period this permit remains in effect, to which the United States and the Republic of South Africa shall be parties.

By accepting this permit, the holder waives any right it may possess to assert any defense of sovereign immunity from suit in any action or proceeding instituted against the holder in any court or other tribunal in the United States (or its territories or possessions) based upon any claim arising out of operations by the holder under this permit.

The holder shall keep on deposit with the Board a signed counterpart of C.A.B. Agreement 18900, an agreement relating to liability limitations of the Warsaw Convention and the Hague Protocol approved by Board Order E-23680, May 13, 1966, and a signed counterpart of any amendment or amendments to such agreement which may be approved by the Board and to which the holder becomes a party.

The holder (1) shall not provide foreign air transportation under this permit unless there is in effect third-party liability insurance in the amount of $1,000,000 or more to meet potential liability claims which may arise in connection with its operations under this permit, and unless there is on file with the Docket Section of the Board a statement showing the name and address of the insurance carrier and the amounts and liability limits of the third-party liability insurance provided, and (2) shall not provide foreign air transportation with respect to persons unless there is in effect liability insurance sufficient to cover the obligations assumed in Agreement C.A.B. 18900, and unless there is on file with the Docket Section of the Board

a statement showing the name and address of the insurance carrier and the amounts and liability limits of the passenger liability insurance provided. Upon request, the Board may authorize the holder to supply the name and address of an insurance syndicate in lieu of the names and addresses of the member insurers.

The holder may not, without prior Board approval, perform charter transportation between New York, on the one hand, and Las Palmas, on the other hand: *Provided, however* That this condition shall not prevent the holder from serving Las Palmas on charter flights operated between New York and Johannesburg. Applications for such authority shall conform to the procedures, to the extent applicable, for issuance of "Statements of Authorization" under Part 212 of the Board's Economic Regulations, or any amendments or modifications of such Regulation.

The exercise of the privileges granted hereby shall be subject to such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

This permit shall be effective on September 28, 1973. Unless otherwise terminated at an earlier date pursuant to the terms of any applicable treaty, convention, or agreement, this permit shall terminate (1) upon the effective date of any treaty, convention, or agreement, or amendment thereto, which shall have the effect of eliminating the route hereby authorized from the routes which may be operated by airlines designated by the Government of the Republic of South Africa, or (2) upon the effective date of any permit granted by the Board to any other carrier designated by the Government of the Republic of South Africa in lieu of the holder hereof, or (3) upon the ter-

mination or expiration of the Air Transport Agreement between the Government of the United States and the Government of the Republic of South Africa, effective, May 23, 1947, as amended by exchange of notes, effective May 23, 1947, and June 28, 1968: *Provided, however,* That if prior to the occurrence of the event specified in clause (3) of this paragraph, the operation of the foreign air transportation herein authorized becomes the subject of any treaty, convention, or agreement to which the United States and the Republic of South Africa are or shall become parties, then and in that event this permit is continued in effect during the period provided in such treaty, convention, or agreement.

IN WITNESS WHEREOF, the Civil Aeronautics Board has caused this permit to be executed by the Secretary of the Board, and the seal of the Board to be affixed hereto, on the 5th day of September, 1973.

EDWIN Z. HOLLAND
Secretary

(SEAL)

Issuance of this permit to
the holder approved by the
President of the United States
on September 28, 1973,
in Order 73-10-2.